FILE COPY

Supreme Court, U.S.
FILED
OCT 20 1970
E. ROBERT SEAVER, CLERK

No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

VS.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONERS

GEORGE M. SCOTT
Post Office Box 76
403 Market Street
Spencer, West Virginia 25276
Attorney for Petitioners

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONERS

ARGUMENT

We will attempt in this Reply to point out the irrelevancies relied upon so heavily by Respondents and many of the *amici curiae* who have filed briefs herein. We will discuss also the recent actions of this Court which we deem material to the issue and the decisions of various lower Courts which have been handed down since the writ of certiorari was issued in this case.

ROANE COUNTY SCHOOLS

The condition of the school facilities in Roane County, West Virginia, has been the subject of substantial com-

ment in the brief of Respondents (P. 3) and in several of the *amicus* briefs. It is said that these facilities are in poor condition and it is suggested that this circumstance might have some relevancy to the question before the Court. We demur. We ask that all such discussion be completely ignored as irrelevant. It cannot be said with any logic that the condition of this school system, whatever it is, has any bearing on the question of whether the voters at a special election were denied equal protection by the extraordinary majority requirements in dispute. If there were an assertion that some student or group of students was being denied equal protection of the laws by reason of the condition of these school facilities, however untenable this might be, then such consideration might become relevant. There is no such assertion in this case and none could be made with any degree of sincerity. We concede that the schools of Roane County could bear improvement and we suspect that the same could be said of the schools in every other county throughout the nation. We deplore, however, a discussion of this circumstance here because it is totally unhelpful to a resolution of the issue before the Court.

Much is made of the fact that no school bonds have been issued in Roane County since 1946. Nothing has been said about the possible political considerations which could have motivated a sufficient number of voters to reject the various proposals since that date. For example, it could be that a lot of money was misappropriated or stolen in 1946; it could be that many of the people involved in such an episode are still prominent in the political and business affairs of the county; and it could be that the local people have a lack of confidence in the administrators of this school system. All

of these hypothetical considerations could have a bearing on the political question of why no bonds have been authorized since 1946 in Roane County, but none of this discussion has any relevancy to the question before the Court. Certainly it could not be said that a voter in the 1968 election was deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment because no bonds have been authorized in Roane County since 1946. We urge the Court to totally disregard all of these extraneous matters and the emotional appeals made in conjunction therewith.

EXTRAORDINARY MAJORITY REQUIREMENTS ARE BASED ON NEUTRAL PRINCIPLES

Respondents herein and many of the *amici curiae* who have filed briefs in supports of the Respondents position herein persist in analogizing this case to the "one man, one vote" cases in an attempt to demonstrate that the "yes" voters in Roane County election were, somehow, discriminated against. The distinctions between all of the "one man, one vote" cases and this case are so numerous and so obvious that we believe it totally unnecessary to enumerate them here. The Supreme Court of California, however, in an amazing opinion in the consolidated actions styled *Westbrook* v. *Mihaly*, 2 Cal. 3d 765, 471 P. 2d 487, decided after the issuance of the writ herein, held that the extraordinary majority requirements created classification of the electorate and that it was sufficient for the "class" to come into being at or after the election. We believe that this opinion demonstrates with extreme clarity the strong undercurrent of emotional and purely political considerations which have pervaded discussions relating to the issues herein. Certainly, if the law does not result in a pros-

pective classification of the voters along discriminatory and constitutionally impermissible lines, the law is valid; and if the "class" comes into being at or after the election, there is no "class".

In these cases, every voter, as he enters the voting booth, has *an equal opportunity with every other voter to affect the outcome of the election,* whether he decides to vote "yes" or "no". There can be no semblance of discrimination in having a rule of decision which requires more than a majority for the authorization of new legislation. Every man stands equally before such a law.

In this connection, we strongly commend to the Court's attention the various discussions of these questions contained in 58 *Georgetown Law Journal* 411 (November 1969), and 56 *Virginia Law Review* 295 (March 1970). We also urge the Court to consider carefully the opinion of the Three-Judge District Court of the Western District of Missouri in the consolidated actions of *Brenner* vs. *Kansas City School District,* Case No. 17660-1, decided August 14, 1970. This case held that the two-thirds majority requirements of the Missouri Constitution and statutes necessary to the authorization of school tax levies and school bonds were valid and did not violate the equal protection clause. Since this opinion has not yet been published, so far as we can learn, we desire to rely for our argument upon the conclusions reached and the reasons advanced in support thereof by that Court. Accordingly, we quote at length from the opinion in that case.

On pages 12 through 14 of that opinion we find the following:

> "The primary difficulty with plaintiffs' 'one-man, one-vote' argument is that it fails to take into ac-

count the factual situations presented in the apportionment cases in which that principle was articulated and applied. Those cases related to elections in which representatives are chosen to represent the people. The weight of votes cast in one district were in fact diluted or enhanced when compared to the votes cast for the same representative elected from another district. *Reynolds* v. *Sims*, 377 U. S. 533 (1964), was explicitly based on the rationale that where such overweight or underweight results from the accident of particular voters' place of residence, the resultant dilution 'impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown* v. *Board of Education*, 347 U. S. 483, or economic status, *Griffin* v. *Illinois*, 351 U. S. 12, *Douglas* v. *California*, 372 U. S. 353 (377 U. S. at 566).

"But the Court explicitly recognized in *Reynolds* v. *Sims* that 'our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures.' A particular State's determination that no school district shall issue school bonds or increase its tax levy unless two thirds of the voters approve simply does not involve questions which relate to the majority control of any legislative body. The purpose of a school referendum simply is not concerned with the election of any public official.

"The type of election involved falls in the general category of elections in which the people are authorized by State law to approve or disapprove the taking of particular governmental action recom-

mended by their elected representatives. Such a referendum election, the theory of which was probably based on town meeting experience, was virtually unknown at state level at the time the Constitution was written.

"In his dissent in *Kramer* v. *Union School District*, 395 U. S. 621, 640 (1969), Mr. Justice Stewart made the point that 'despite the Court's undifferentiated references to what it terms "the franchise," ' it should be emphasized that 'we are dealing here, not with a *general* election, but with a *limited special-purpose election*'. The per curiam opinion of the Court in *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969), used the similar 'limited purpose election' language. Mr. Justice White, writing for the majority in *Phoenix* v. *Kolodziejski*, — U. S. — (1970), No. 1066, October Term 1969, decided June 23, 1970, but not yet reported, 38 L. W. 4511, (399 *U. S.* 204 [citation supplied]), carefully described a school bond election as 'a governmental decision subject to a referendum.' In his dissenting opinion in that case, Mr. Justice Stewart raised the question of whether 'this case really involved an "election," that is, a choice by popular votes of candidates for public office under a system of representative democracy, . . .'

"The important consideration which must be kept in focus is that a school bond or levy election is an entirely different sort of political process than that involved in the election of a public official. No actual classification of groups of voters is involved in a school referendum election. No one even knows who is going to vote 'yes' or who is going to vote

'no.' No one knows how the election will be decided until the votes are counted.

"We quite agree with the Comment in 58 Georgetown Law Journal, 411, 418 (November, 1969) which concluded that 'the reapportionment cases as a class can be distinguished factually on the ground they involved only the right of the electorate to choose representatives.' It was, we believe, properly stated that:

" 'The reapportionment cases ultimately speak to the issue of equality of representation, not equality of vote. To insure equal representation, the vote of each person in every constituency must be of equal weight, a result attainable only when the constituencies themselves are equal in terms of population. In such instances, full and effective participation by all citizens in the political process demands application of the one man-one vote rationale. In the case of a bond referendum, however, the principle is inapposite, since the voters are deciding only whether they should tax themselves; full and effective participation already is guaranteed because the voters are exercising the franchise directly, rather than through representatives casting vicarious votes in the legislature. Since the consequences of electing a representative differ significantly from those of a bond referendum, what is necessary to guarantee fairness in one should not be applied automatically to the other.'

"We conclude that the Supreme Court's articulation of the 'one-man, one-vote' apportionment principle does not carry with it, either implicitly or explicitly, a federal Constitutional command that all State school bond and tax levy elections must

be decided by a simple majority vote of the voter participating in such an election."

We also adopt the reasoning advanced on pages 29 through 34 of the *Brenner* opinion:

"We believe our determination of this case is consistent with two recent, but generally unnoticed decisions of the Supreme Court. Those cases are *Turner* v. *Clay*, 397 U.S. 39 (1970), decided February 4, 1970; and *Adams* v. *City of Colorado Springs*, October Term 1969, No. 1522, — U.S. —, decided June 22, 1970, but not yet reported, 38 L.W. 3506 (see 26 L. Ed. 2d 555 [citation supplied]).

"In *Turner* v. *Clay* the Supreme Court granted motions to dismiss the plaintiffs' pending appeal 'for want of a substantial federal question.' The appeal had been taken from the decision of the Supreme Court of South Carolina in *Clay* v. *Thornton*, (Sup. Ct. of So. Car., 1969) 169 S.E. 2d 617.

"In *Adams* v. *City of Colorado Springs*, the Supreme Court summarily affirmed the three judge court decision of the United States District Court for the District of Colorado which denied plaintiffs relief in *Adams* v. *City of Colorado Springs*, (D. Colo., 1970) 308 F. Supp. 1397. (Judgment affirmed, 26 L. Ed. 2d 555, June 22, 1970 [citation supplied]).

"Stern and Grossman point out in their Supreme Court Practice, Sec. 4.28, p. 197, that 'The Court is . . . deciding a case on the merits when it dismisses for want of a *substantial* federal question, or affirms summarily'. It is therefore relevant and important

to examine the questions presented and decided on the merits in these two recent Supreme Court cases.

"The question presented in *Clay* v. *Turner,* as stated in the Jurisdictional Statement filed in the Supreme Court, was: 'Does . . . the South Carolina Constitution of 1895 as interpreted and applied by the South Carolina Supreme Court to require more votes for the incorporation of a city than a majority of those voting in an election for incorporation deprive the majority of those voting, including appellants, of the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the United States Constitution?'

"An area designated in South Carolina as North Charleston sought incorporation. There were 16,900 electors residing and entitled by law to vote within that area. At the incorporation referendum election only 7,315 voters cast ballots; 4,572 voted 'yes,' the remainder voted 'no.' The South Carolina Supreme Court stated that 'it is apparent that, while a majority of those voting voted favorably, a majority of 16,900 qualified electors in the area did not cast ballots in favor of incorporation.' The Supreme Court of South Carolina explicitly rejected the argument that South Carolina, having determined to ascertain consent to incorporate by way of an election, must also apply Lord Mansfield's presumption that all who absent themselves from an election must be deemed to assent to the expressed will of the majority of those voting. Plaintiffs argued that the trial court's failure to do so violated the Equal Protection Clause of the Fourteenth Amendment. It was argued that the construction given the South

Carolina Constitution, which sustained the extraordinary majority ground rule, permitted the State 'to add the "non-votes to the negative votes cast" . . . thereby diluting the votes of those persons voting for incorporation.'

"The underlying assumption upon which plaintiffs' argument in *Clay* v. *Turner* was based was basically the same as the underlying assumption upon which plaintiffs' argument in this case is based. Both proceed on the notion that if a State utilizes an election for the purpose of obtaining the approval of the qualified voters for a proposed governmental action, as distinguished from the election of a public official, there is something in the Constitution or in the Equal Protection Clause of the Fourteenth Amendment which somehow prohibits such State from requiring any majority other than a simple majority. The South Carolina Supreme Court disposed of plaintiffs' argument that the 'yes' votes would be 'diluted' by stating that:

> " 'The foregoing argument is based upon the principles announced by the United States Supreme Court in the recent reapportionment cases, citing *Reynolds* v. *Sims* . . . among others. Their principles have no application here.'

"The Jurisdictional Statement filed by appellants in the Supreme Court in *Turner* v. *Clay* shows that the rationale of the argument there presented was, in essence, the same as the argument plaintiffs present to this Court. Both arguments attempted to use the language of *Kramer*—'Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment'—as a spring-

board for their respective 'one-man, one-vote' argument. Appellants in *Turner* v. *Clay* argued in their Jurisdictional Statement filed in the Supreme Court that 'the principle of one-man, one-vote is a fundamental right;' that under the South Carolina law 'the right of franchise has been given to the people but has been subjected to limitation by the number of votes required;' that the South Carolina Supreme Court's application of the South Carolina constitutional extraordinary majority requirement 'has resulted in the "debasement or dilution" of the vote of those voting in favor of incorporation;' and that 'under the actual facts of this case, each negative vote has been given the effect of one and two-thirds affirmative vote.'

"In the Supreme Court the appellants in the South Carolina case, as do plaintiffs in this case, relied upon *Lance* v. *Roane County Board of Education*, (Sup. Ct. App., W.Va., 1969) 170 S.E. 2d 783, cert. granted *sub nom. Gordon* v. *Lance*, 397 U.S. 1020 (April 6, 1970), decided by the West Virginia Supreme Court last year.

"'Appellees' motions to dismiss in the Supreme Court were based on the express ground that the appeal did not present 'a substantial federal question.' Appellees contended that South Carolina had not in any manner limited 'the right of franchise of any elector' and that the South Carolina constitutional provision related to matters which 'rest in the absolute discretion of the State of South Carolina and are matters of State interest only.'

"It is our view that the Supreme Court's action in granting the motions to dismiss in the South

Carolina case for want of a substantial federal question, at least implicitly, rejected the rationale upon which plaintiffs' Equal Protection Clause claim in this case is based. This Court is under duty to give appropriate deference to the Supreme Court's action on the merits in *Turner* v. *Clay*.

"*Adams* v. *City of Colorado Springs* involved a quite different factual situation but the legal principles involved were the same. The Colorado General Assembly passed a statute which permitted some, but not all, Colorado municipalities to annex contiguous territory only when approved by a majority vote of the qualified electors in the territory to be annexed. Judge Doyle, in his opinion for the three-judge court, stated that 'plaintiffs concede that the Colorado General Assembly is empowered to create annexation machinery without granting the right to vote, but maintains that when the Assembly extends the franchise to one group it must extend the same right to another group, absent a compelling public reason.' Judge Doyle stated:

> " 'Plaintiffs seek to equate their position with that of the plaintiffs in the several voting rights cases. *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Carrington* v. *Rash*, 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed. 2d 675 (1965); *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); and *Gray* v. *Sanders*, 372 U.S. 368, 83 S. Ct., 801, 9 L. Ed. 2d 821 (1963). [308 F. Supp. at 1402].'

"The three-judge court disposed of that argument by concluding that:

> " 'On its face this argument appears to have merit in that the right to vote poses a sensitive constitutional issue demanding scrupulous evaluation. However, on a closer look, it does not appear that the plaintiffs' rights are of the kind that have been upheld by the Supreme Court. . . .
>
> " 'Although we concede that the plaintiffs' case has equitable appeal, they have not demonstrated a violation on the Fourteenth Amendment of the Constitution in terms of either inequality or due process. Hence, their claim must fail.'

"The argument in the Jurisdictional Statement filed in the Supreme Court by appellant plaintiffs was based on the same cases and the same basic rationale as those relied upon by plaintiffs in this case. The appellants in the Colorado Springs case contended in the Supreme Court that under 'the whole line of cases from *Baker* v. *Carr* through *Kramer* and *Cipriano* [a] substantial federal question is presented.' Appellees, in their Motion to Dismiss or Affirm in the Supreme Court contended that 'the cases cited by Appellants in this Jurisdictional Statement alleging invidious discrimination deal with legislative apportionment and voting rights' and are therefore 'irrelevant . . . and inapposite.'

It is our view that the action of the Supreme Court summarily affirmed the three-judge court is consistent with the view we have expressed in regard to this case and that we must give appropriate weight to the Supreme Court's action on the merits in *Adams* v. *City of Colorado Springs.*"

Furthermore, we wish to specifically adopt the language of that Court appearing on page 36 of the opinion as follows:

> "This Court recognizes that there are many who view the sometimes slow working of the political processes of American government with great impatience. At least some have come to look upon the judicial branch of the government as an available means to speed the process of what many may view as reform. But all must recognize that neither the Constitution nor the courts which construe it are a panacea for all the problems which our States and Nation face.
>
> "The Constitution of the United States is an enduring instrument of government which permits the States to indulge in the widest area of experiment with ideas of local government. No court can properly apply its personal notion of whether a particular idea is or is not in the public interest. A State may adopt a wide range of constitutionally permissible ideas as a part of its declared public policy. A court may not properly substitute its personal judgment as to whether such an idea is good, bad, or indifferent. It may only determine whether the incorporation of an idea into law is prohibited by the Constitution of the United States or any of its Amendments. And that is all we have done in this case."

Another more recent case has also upheld the validity of extraordinary majority requirements in school bond elections. In the case of *Thurston, et al.* vs. *Greco, et al.*, Case No. 41444 in an opinion filed September 24, 1970, and not yet reported, the Supreme Court of the State

of Washington upheld the 60% requirements of the Constitution and the statutes of that state. This Court could find no discrimination in such a provision of law.

CONCLUSION

In view of all of the foregoing we submit that an extraordinary majority requirement in a special election such as that in the instant case is based upon neutral principles, that such a requirement has nothing to do with discrimination, invidious or otherwise, that it creates no classification of people, and that the Fourteenth Amendment neither requires majoritarian principles nor prohibits extraordinary majority requirements in such elections. For these reasons, we respectfully urge that the judgment of the Supreme Court of Appeals of West Virginia be reversed.

Respectfully submitted this 17th day of October, 1970.

GEORGE M. SCOTT
Post Office Box 76
403 Market Street
Spencer, West Virginia 25276
Attorney for Petitioners